No. 93-1525

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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

MICHAEL A. LEBRON,

Petitioner,

—v.—

NATIONAL RAILROAD PASSENGER CORPORATION (AMTRAK),

Respondent.

ON WRIT OF *CERTIORARI* TO
THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE NEW YORK CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI* [1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization with nearly 300,000 members. The New York Civil Liberties Union (NYCLU) is one of its statewide affiliates. Since its founding over 70 years ago, the ACLU has consistently promoted individual rights and liberties, including the right to freedom of expression. It has litigated or participated as *amicus* in hundreds of cases brought to vindicate First Amendment rights. In 1991 the ACLU established an Arts Censorship Project specifically to combat an increased climate of censorship in the United States.

Accordingly, the issues presented by this case involve matters of direct concern to the ACLU. We therefore submit this brief *amicus curiae* to assist the Court in its deliberations.

STATEMENT OF THE CASE

This case concerns an artist who was refused access to advertising space in New York's Pennsylvania Station based on the "political" content of his work. Michael A. Lebron contacted Amtrak in 1991 about displaying an advertisement in a large billboard space in Penn Station known as the Spectacular. The work he sought to display was a photomontage with text. The work was described by the district court as "[t]aking off on a widely circulated Coors beer advertisement," and "criticizing the Coors family for its support of right-wing causes . . . ." *Lebron v. National R.R. Passenger Corp. (Amtrak)*, 811 F. Supp. 993, 995 (S.D.N.Y. 1993).

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

During the negotiation of the contract to rent the space, Lebron notified Amtrak's advertising rental agency that the work he intended to install was political. He was not told that this would be a problem. In November 1992, Lebron and Amtrak signed a contract for the space. Three days before the advertisement was to appear, however, Lebron learned that Amtrak had changed its mind. He was informed that Amtrak had a policy prohibiting display of "political" advertising.

Lebron sued, alleging violation of his First Amendment rights. The district court ruled for Lebron. 811 F.Supp. 993. The court first held that Amtrak was a state actor "based on examination of the federal government's deep and controlling entwinement in Amtrak's structure and operations." *Id.* at 997. The court made findings about the many specific ways in which the federal government was involved in the activities of Amtrak. *Id.* at 997-1000. The court went on to find that Amtrak's rejection of Lebron's work violated the First Amendment. *Id.* at 1001-05.

On appeal, a divided panel of the Second Circuit reversed. *See Lebron v. National R.R. Passenger Corp. (Amtrak)*, 12 F.3d 388 (2d Cir. 1993). The majority held that Amtrak was not a state actor, relying in part upon its view that a party should be required to meet a higher burden to show state action in First Amendment cases than in some other constitutional cases. Judge Newman dissented on the ground that the district court's findings of extensive government involvement "in the structure and financing of Amtrak" sufficiently demonstrated state action.

SUMMARY OF ARGUMENT

The court below erred when it dismissed Lebron's claim on the ground that Amtrak was not a state actor and therefore was not bound by the First Amendment.

Amtrak has significant and pervasive connections to the government. Under the "mutual contacts" test for state action that this Court has applied since *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 725 (1961), and has continued to apply in more recent years, *see, e.g., Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), respondent should be held to be a state actor and its actions should be required to conform to the First Amendment.

This Court has long recognized that in certain circumstances where the government and a private actor are pervasively intertwined, state action should be found regardless of whether a specific action has been funded, encouraged, or coerced by government. This Court has looked to three factors in making this determination: (1) whether the government is significantly and pervasively involved in the private entity's affairs; (2) whether the government controls the activities of the private entity; and (3) whether the ties between the government and the private entity create the appearance of state involvement in unconstitutional conduct. Under these guidelines, Amtrak, with its broad and pervasive ties to the federal government, is a state actor subject to constitutional standards.

The court below also erred in holding that different tests of state action should be used to determine whether an ostensibly private entity should be held to constitutional standards depending on the constitutional right involved. The state action analysis should not vary depending on the constitutional right involved. Moreover, in no case should a test be applied that accords the First Amendment anything less than the highest level of protection.

ARGUMENT

I. AMTRAK'S SIGNIFICANT ENTANGLEMENTS WITH GOVERNMENT MAKE IT A STATE ACTOR WHOSE DECISIONS ARE SUBJECT TO THE FIRST AMENDMENT

This Court has long held that state action may be found when private parties' actions are significantly entangled with the government. There is no easy formula for making these determinations: it may be difficult at times to decide precisely how much entanglement is enough. But the absence of a neat formula does not detract from the clear importance of the principles underlying this notion that significant and pervasive connections to the government can create state action. In cases such as this one, where a putatively private party has extensive entanglements with the government that create both the appearance and the reality of government involvement, this Court should have no hesitation in reaffirming the principle that when government has "so far insinuated itself into a position of interdependence" with a private entity, "it must be recognized as a joint participant in the challenged activity." *Burton v. Wilmington Parking Authority*, 365 U.S. at 725.

For more than three decades, this Court has held that when the connections between a private party and the government are sufficiently great, the actions of the private party constitute state action. *See, e.g., Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478, 486 (1988)("[W]hen private parties make use of state procedures with the overt, significant assistance of state officials, state action may be found"); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (state action held to exist based on involvement of state officials in prejudgment attachment process in which debtor's property was taken); *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (state action where private restaurant has "symbiotic relationship" with

governmental entity).

This particular strand of the state action doctrine goes by different names, including the "mutual contacts" test, the "symbiotic relationship" test, the "multiple contacts" test, and the "nexus" test. *See, e.g., Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 175 (1972)(discussing the "symbiotic relationship" test); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974)(discussing "nexus" between actor and state); R. Rotunda & J. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE 558 (2d ed. 1992)(discussing "mutual contacts" and "multiple contacts" test). But however it is expressed, the idea is the same: that in some cases "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966).

There has been a fair amount of uncertainty expressed recently over the condition of state action jurisprudence generally and over the "mutual contacts" test specifically. *See, e.g., Edmonson v. Leesville Concrete Co*, 500 U.S. 614, 631 (1991)(O'Connor, J., dissenting); L. Tribe, AMERICAN CONSTITUTIONAL LAW 1690 (2d ed. 1988)("the Supreme Court has not succeeded in developing a body of state action 'doctrine,' a set of rules for determining whether governmental or private actors are to be deemed responsible for an asserted constitutional violation"). Indeed, few would argue that state action doctrine today is not in need of some clarification and reevaluation. The question is how to clarify and reevaluate the doctrine without doing damage to the worthy principles underlying it.

With increasing frequency, the state action inquiry has focused on whether the government has coerced or provided significant encouragement to the particular activity that is being challenged on constitutional grounds.

See, e.g., Blum v. Yaretsky, 457 U.S. 991, 1005 (1982); *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). That inquiry is a fair and reasonable one. A finding of state action is undoubtedly appropriate where a direct nexus exists between the government and the allegedly unconstitutional conduct of a "private" party. *See Blum*, 457 U.S. at 1005. It does not follow, however, that proof of such a direct nexus is the only way that state action can be established. For example, the government cannot evade its constitutional obligations by delegating traditional public functions to "private" actors. *See West v. Atkins*, 487 U.S. 42 (1988).

In addition, this Court has long recognized, and appropriately so, that in certain circumstances where the government and a private actor are pervasively intertwined, state action should be found regardless of whether a specific action has been funded, encouraged or coerced by government. Underlying this notion is the simple fact that in some situations two distinct entities become so interconnected that in appearance and reality they are essentially one. When this line is crossed, it is a mistake to treat these entities as if they were in fact separate actors. To do so elevates form over function, and misstates the proper status of the parties before the law.

When one of these parties is a government entity and the other is a private actor, the harm done by ignoring their interconnection is very specific. It allows citizens' constitutional rights -- to free speech, to free exercise of religion, to equal treatment under the law -- to be violated in a manner that is little different than if the government did so directly. If the Constitution prohibits the state from infringing on these rights directly, it should also be held to prohibit the state from taking these rights away through close collusion with a private party. In addition, insulating decisions by putatively private actors with extensive government entanglements

from constitutional review is harmful because it creates the appearance of government involvement in the deprivation of its citizens' constitutional rights.

One of the sources of dissatisfaction with the "mutual contacts" test is that it is said to be lacking in precision. *See, e.g.*, Rotunda & Nowak, TREATISE ON CONSTITUTIONAL LAW at 559. It is true that decisions in this area do not lend themselves to an "infallible test," *Reitman v. Mulkey*, 387 U.S. 369, 378 (1967), and that "[o]nly by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed to its true significance." *Burton*, 365 U.S. at 722. But this absence of a formulaic standard does not mean that the test is lacking in underlying principles, or that this Court should abandon the doctrine. *Cf. Waters v. Churchill*, __ U.S. __, 114 S.Ct. 1878, 1885 (1994)(absence of precise test for when procedural safeguard is required by First Amendment "does not relieve [the Court] of [its] responsibility to decide" the issue) (O'Connor, J.)(plurality opinion).

In fact, there are three overarching and somewhat overlapping principles that have long guided this Court's "mutual contacts" decisions and that should continue to do so: (1) that state action should be found where the government is significantly and pervasively involved with the affairs of a putatively private party whose actions are challenged; (2) that state action should be found where the putatively private actor is in fact effectively under the control of the government; and (3) that state action should be found in cases where the ties between the putatively private actor and the government are such that the appearance is created for the public at large that the government is involved in unconstitutional activity. Each of these underlying principles is important, and each compels a finding in this case that Amtrak is a state actor.

First, this Court's jurisprudence has long recognized

that state action may arise because of the government's significant and pervasive involvement[2] in the affairs of a "private" enterprise. It is a principle that dates back to this Court's early race discrimination cases, and that has never depended on a showing that the government is directly linked to the specifically challenged action. *See, e.g., Burton*, 365 U.S. 715; *Evans v. Newton*, 382 U.S. 296. It is also a principle that has been reaffirmed by this Court in numerous recent cases. *See, e.g., Edmonson v. Leesville Concrete Co.*, 500 U.S. 614; *Tulsa Professional Collection Services*, 485 U.S. at 486; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922.

The rationale underlying this principle was cogently set forth in *Burton*:

> [A]ll these activities, obligations and responsibilities of the [state], the benefits mutually conferred, together with the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service, indicate[] that degree of state involvement in discriminatory action which it was the design of the Fourteenth Amendment to condemn.

Burton, 365 U.S. at 725; *see also Evans*, 382 U.S. at 301 (court finds state action in putatively private park in part because municipality "swept, manicured, watered, patrolled, and maintained" it).

In a number of recent cases, this Court has reiterated that state action will be found where a private party

[2] This "involvement" must take the form of more than just financial assistance. *See Rendell-Baker*, 457 U.S. at 841. When a private entity merely takes government funding, much like a private contractor, it is not a state actor. *See id.* But in cases like this one, where the assistance goes well beyond mere financial payments, this test is met.

is supported by "the overt, significant assistance of state officials." *Tulsa Professional Collection Services*, 485 U.S. at 486. In *Tulsa Professional Collection Services*, the Court found that the involvement of a state probate court in the enforcement of a state nonclaim statute was enough to constitute state action. *See id.* at 486-87. In *Edmonson*, Justice Kennedy wrote for a majority of the Court that the "overt, significant participation of the government" in the establishment and maintenance of the jury system helped to render the peremptory challenges of a private civil litigant state action. *Edmonson*, 500 U.S. at 622; *see also id.* at 628 ("when private litigants participate in the selection of jurors, they . . . act with [government's] substantial assistance"). Similarly, this Court stated in *Lugar* that a party may be held to be a state actor where he has "acted together with or has obtained significant aid from state officials." *Lugar*, 457 U.S. at 937. In *Lugar*, the Court held that a private actor who engaged in a prejudgment attachment of disputed property with the assistance of state actors had sufficient assistance from state officials in the attachment to render the activity state action. *See id.* at 941-42.

It should not be necessary that this significant and pervasive assistance go to the precise activity that is being challenged. When the entanglements between government and a private party are sufficiently great, that party should be considered a state actor for constitutional purposes. In *Evans*, for example, it was not necessary that the state directly assist the municipal park in excluding black citizens: it was enough that the state was closely intertwined with the park, and that the park's policies violated equal protection principles.

The extent to which the government benefits from its relationship to the private actor is also a relevant consideration. When the government stands to gain from the success of the private actor -- and particularly from its unconstitutional activities -- there is additional

basis for finding state action. *See Burton*, 365 U.S. at 724 (discriminatory policy of restaurant allegedly increased revenues and worked to the financial advantage of its landlord, the government).

Of course, this Court has held that the mere fact that a private entity receives government grants or contracts large amounts of business with the government does not render it a state actor. *See Rendell-Baker v. Kohn*, 457 U.S. at 841 (no state action where the private entity "is not fundamentally different from many private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government"); *see also Blum v. Yaretsky*, 457 U.S. 991 (no state action where decision to discharge patient was made by private physician despite the fact that it was influenced by medicaid standards).

But neither *Rendell-Baker* nor *Blum* is inconsistent with the fundamental notion, frequently affirmed by this Court, that at some point a line is crossed where the government is so involved with the affairs of a putatively private actor that the latter's actions can no longer be regarded as purely private. Minor levels of government involvement with a private party should not and do not transform that party into a state actor; indeed, funding alone is never enough to transform a private entity into a state actor. *Rendell-Baker*, 457 U.S. at 846. But when the involvement is sufficiently great and pervasive a point is reached where the government "must be recognized as a joint participant" in the private party's unconstitutional actions. *Burton*, 365 U.S. at 725. This was the simple point of *Lugar* -- that at a certain point a private actor, pursuing its private ends, involves the state to such a degree that it must be seen as having passed over the line from private actor to state actor. *See Lugar*, 457 U.S. 922.

Second, this Court's cases have long held that state action may arise where a putatively private actor is in

fact effectively under government control. In *Burton*, the Court based its finding of state action in part on the control that the state exercised over the racially discriminatory restaurant. The Court noted the state's ability to influence the restaurant's actions through its lease and held that it therefore "could have affirmatively required [the restaurant] to discharge the responsibilities under the Fourteenth Amendment imposed upon the private enterprise as a consequence of state participation." *Burton*, 365 U.S. at 725; *see also Evans*, 382 U.S. at 301 ("If the municipality remains entwined in the management or control of the park, it remains subject to the restraints of the Fourteenth Amendment . . . .").

The workings of this government control principle can be seen in this Court's holding in *Little v. Streater*, 452 U.S. 1 (1981). In *Little*, an indigent man being sued for paternity alleged that a statute requiring him to pay the cost of a blood test violated his right to due process. Although the paternity suit was brought by a private individual, the Court noted that "unlike a common dispute between private parties, the State's involvement in this paternity proceeding was considerable and manifest, giving rise to a constitutional duty." *Id.* at 9. The Court emphasized the many ways that the suit, although nominally brought by a private individual, was in fact controlled by the state: a state statute required her to bring the action because the child received public assistance; the State's Attorney General automatically became a party and was required by statute to approve any settlement of the suit; the state paid the fees of the plaintiff's lawyer; and the state would receive any monthly support payments awarded by the court. *See id.* The Court concluded after reciting these indicia of control that "'[s]tate action' has undeniably pervaded this case." *Id.*

Conversely, in a number of cases where state action was not found, this Court has gone out of its way to emphasize that the private actor was not under the control

of the state. In *San Francisco Arts & Athletics Inc. v. United States Olympic Committee*, 483 U.S. 522 (1987), for example, this Court reiterated that state action could arise from state control over a private actor. However, the Court held that the U.S. Olympic Committee was not a state actor when it denied another group the right to use the word "Olympics." In reaching this holding, the Court emphasized that the group had "failed to demonstrate that the Federal Government can or does exert any influence over the exercise of the USOC's enforcement decisions." *Id.* at 547 n.29.

This "government control" principle allows courts to hold actors in undertakings that are significantly under the control of the government to the standards that would apply to the government if it were acting alone. This principle does not bring the standards of the Constitution into truly private areas where they do not belong. Rather, it is a crucial rule for ensuring that the government does not circumvent constitutional limitations by doing its unconstitutional deeds through a putatively private party that it in fact controls.[3]

Finally, this Court's state action cases have long recognized that state action may be found where the ties between a putatively private party and the government create an appearance of government authorization of the challenged activity. This concern about the appearance of government involvement in constitutional violations is a strand that runs through a number of this Court's state action cases. In *Burton*, the Court emphasized the ways in which the government appeared to the public to be connected to the restaurant that discriminated on the basis of race. It noted "the obvious fact that the restaurant is operated as an integral part of a public building devoted to a public parking service," 365 U.S. at 724, and the fact that "the Authority located at appropriate places [on the facility] official signs indicating the public character of the building, and flew from mastheads on the roof both the state and national flags." *Id.* at 720.

Similarly, in *Evans v. Newton*, this Court held that a racially segregated municipal park could not remain all-white by changing from public to private ownership. The Court's analysis turned in significant part on the fact that, despite the change in control, the appearance of government involvement in the park's racially discriminatory practices would remain. As the *Evans* Court stated:

> The momentum [the park] acquired as a public facility is certainly not dissipated *ipso facto* by the appointment of 'private' trustees .... Whether these public characteristics will in time be dissipated is wholly conjectural .... We only hold that where the tradition of municipal control had become firmly established, we cannot take judicial notice that the mere substitution of trustees instantly transferred this park from the public to the private sector.

Evans, 382 U.S. at 304; *see also San Francisco Arts & Athletics*, 483 U.S. at 557 (state action should be found because "in the eye of the public . . . the connection be-

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[3] In other doctrinal areas, the law looks beyond the formal status of an actor to hold responsible another party that is really in control of the undertaking. *See, e.g., Kreuger v. Mammoth Mountain Ski Area, Inc.*, 873 F.2d 222 (9th Cir. 1989)(master may be liable for negligence of servant under *respondeat superior* theory); *Esmark, Inc. v. N.L.R.B.*, 887 F.2d 739 (7th Cir. 1989)(shareholder may be liable for obligations of corporation where the corporation was a mere instrumentality or alter ego). The law also recognizes in other areas that an actor may take on added legal burdens by engaging in joint enterprises with other parties. *See, e.g., United States v. Douglass*, 780 F.2d 1472 (9th Cir. 1986)(each conspirator liable for criminal acts of other conspirators if reasonably foreseeable and done in furtherance of the conspiracy); *Stifle v. Marathon Petroleum Co.*, 876 F.2d 552 (7th Cir. 1989) (when injury results from negligence of multiple parties entire liability attaches to each party under theory of joint and several liability).

tween the decisions of the United States Government and those of the United States Olympic Committee is profound")(Brennan, J. dissenting); *id.* at 548 (contending that state action exists "largely for the reasons explained by Justice Brennan")(O'Connor, J., concurring in part and dissenting in part).

More recently, in its peremptory challenge cases, this Court based its findings of state action in part on the *appearance* that such challenges create of government participation in discrimination. In *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, this Court considered whether civil litigants should be permitted to use peremptory challenges in a racially discriminatory manner. In holding that they should not, the Court noted that the discrimination has the appearance of involving the government and its system of justice simply by virtue of the location in which it occurs:

> [T]he injury caused by the discrimination is made more severe because the government permits it to occur within the courthouse itself. Few places are a more real expression of the constitutional authority of the government than a courtroom, where the law itself unfolds .... To permit racial exclusion in this official forum compounds the insult inherent in judging a citizen by the color of his or her skin.

Id. at 628. Similarly, in *Georgia v. McCollum*, 505 U.S. __, 112 S.Ct. 2348 (1992), this Court noted that even when a criminal defendant uses peremptory challenges in a discriminatory manner, an unacceptable appearance is created of government complicity: "Regardless of who precipitated the jurors' removal, the *perception* and the reality in a criminal trial will be that the court has excused jurors based on race, an outcome that *will be attributed to the State*." *Id.* at 2356 (emphasis added).

Elsewhere in its constitutional jurisprudence, this Court has emphasized the importance of the government not appearing to act in an unconstitutional manner. In Establishment Clause cases, the Court frequently emphasizes that the government may not create the impression among its citizens that it is endorsing a particular religion or religion generally. In *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court struck down a state law requiring a moment of silence in public schools in part because of the appearance it created: because the manner of the statute's enactment "convey[ed] a message of state approval of prayer activities in the public schools." *Id.* at 61. As Justice O'Connor wrote in a separate opinion: "The relevant issue is whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in the public schools." *Id.* at 76.[4]

In this case, all three principles underlying the "mutual contacts" test militate strongly in favor of finding that Amtrak is a state actor. First, there can be no real doubt that Amtrak receives overt and significant assistance from the state. There are few, if any, nonpublic entities in this nation's history that have received Amtrak's munificent level of state assistance. Amtrak was created by Congress with $40 million in federal grants and $300 million in federal loans. In each of its 24 years of existence, the government has covered Amtrak's oper-

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[4] *See also School Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 397 (1985)(invalidating program sending state teachers into sectarian schools in part because "[t]he symbolic union of church and state inherent in the [program] threatens to convey a message of state support for religion to students and to the general public"); *Lee v. Weisman*, 505 U.S. __, __, 112 S.Ct. 2649, 2678 (1992)("When public school officials, armed with the State's authority, convey an endorsement of religion to their students, they strike near the core of the Establishment Clause")(Souter, J., joined by O'Connor, J. and Stevens, J., concurring).

ating deficits -- including congressional appropriations of more than $3 billion in the last five years alone. The government's assistance, moreover, goes far beyond these financial subsidies, significant as they are. Amtrak's principal properties, such as Penn Station, were acquired by the United States and the United States continues to hold the mortgages on them. In addition, Congress has vested Amtrak with the right of eminent domain, with exemptions from all state and local taxes, and with the ability to borrow under the credit of the federal government.

Furthermore, the purported justification for Amtrak's decision in this case was its concern over possible lost revenues from offended customers or advertisers. Here, as in *Burton*, that concern only highlights the interdependence between Amtrak and the government. Under the unique arrangement that first created Amtrak, any increase in the size of Amtrak's deficit also increases the size of the government's promised contribution.

No fair reading of these facts could lead to the conclusion, reached in *Rendell-Baker*, that respondent "is not fundamentally different from many private corporations whose business depends primarily on [government] contracts." 457 at 840-41. To the contrary, it seems abundantly clear that "without the overt, significant participation of the government . . . . [Amtrak] simply could not exist." *Edmonson*, 500 U.S. at 622.

Second, there is no question that the government exerts extensive control over Amtrak. Like the government assistance it receives, the degree of government control imposed on Amtrak is truly massive. It is not a question of a private actor feeling some level of subtle coercion from the state. The state's control of Amtrak reaches to its very core. The United States government owns all of Amtrak's preferred and voting stock. All of Amtrak's directors are appointed directly or indirectly by the President of the United States, including the Secre-

tary of Transportation, who serves on the board *ex officio*. Amtrak must report annually to Congress on its finances, and its financial records are audited by the Inspector General and subject to audit by the Comptroller General. As in *Little*, 452 U.S. 1, where state action existed because the state's involvement in the paternity proceeding was "considerable and manifest," here the government's involvement in and control over Amtrak's operations is so great that it is difficult to question seriously that the actions of Amtrak are effectively those of the government.

Finally, the ties between Amtrak and the state are such that the appearance is created for the public at large that the government is involved in unconstitutional activity. Amtrak may look to subtle statutory provisions and passages from corporate documents to make an argument that it is somehow distinct from the government. But these fine points are no doubt lost on most members of the public. Amtrak operates out of Penn Station, alongside two public authorities, New Jersey Transit (NJT) and the Long Island Rail Road (LIRR). LIRR and NJT facilities, such as ticket windows and information booths, are interspersed with Amtrak's throughout the station. Amtrak is also subject to the Freedom of Information Act, is defined as a "public entity" for purposes of the Americans with Disabilities Act, and is characterized in its own governing statute as a "mixed ownership government corporation." *Lebron*, 811 F. Supp. at 997. To a member of the public who is aware of even just these limited facts, there can be no real question that when Amtrak acts the "perception" will be that government is implicated and those actions "will be attributed to the State." *McCollum*, 112 S.Ct. at 2356.

The perils of holding that respondent is not a state actor are significant for First Amendment purposes. As the district court noted, if Amtrak is held not to be a state actor,

> [i]t would be free to exercise discriminatory control over the messages transmitted by its billboards. For example, as the Presidential election approached, Amtrak would have the absolute right to devote all of its billboards to champion the reelection of the incumbent president and warn of danger to the republic if the challenger should be elected .... Similarly, Amtrak would be free to sponsor advertisements on its billboards either opposing abortion or favoring choice; it could likewise advocate adherence to Catholicism and deprecate Protestantism, or vice versa, as it chose.

Lebron, 811 F.Supp. at 1000. It is hard to imagine that the reach of state action doctrine is so restricted that it would not prevent a President from using his power to appoint a majority of the Amtrak board, and then having that board turn around and use Amtrak's considerable resources to advocate its benefactor's policies and otherwise manipulate public opinion in a politically partisan way.

It does no damage to the principle that private conduct is outside of the reach of the Constitution to say that when government entanglements reach a certain point, state action will be found. This is not a case of a truly private actor being held to constitutional standards due to minor interactions with government. Here, the government undertook to underwrite a corporation with millions of dollars in grants and loans, to appoint its entire board, to control all of its voting stock, to buy and hold the mortgages on its major places of operation, and to spend billions of dollars paying off its operating deficits. Whatever the government chooses to call this corporation, this Court should have no hesitancy in calling it a state actor.

II. NO MORE STRINGENT STANDARD SHOULD BE USED TO FIND STATE ACTION IN FIRST AMENDMENT CASES THAN IS USED IN RACE DISCRIMINATION, GENDER DISCRIMINATION OR OTHER CONSTITUTIONAL CASES

The court below reached its decision that Amtrak was not a state actor in part by taking an unfounded and improperly narrow view of the level of protection First Amendment rights should be given in state action analysis. The court indicated that "a less stringent standard for finding state action should be applied when racial or sexual discrimination is at issue . . . than when there is a claim of a First Amendment violation." *See Lebron*, 12 F.3d at 392.

The Second Circuit's rationale for using a less exacting state action test for race and gender discrimination cases is essentially that those rights are more important than other rights. *See Weise v. Syracuse University*, 522 F. 2d 397, 405 (2d Cir. 1975).[5] Clearly, race and gender

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[5] The Second Circuit's adherence to differential tests for state action is long-standing. In *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973), the court found no state action in a law school's expulsion of a student for allegedly engaging in anti-war activities protected by the First Amendment. In holding that grants from the state to the law school did not make the school a state actor, the court stated:

> It could well be that such grants by the state, even though they represent only a small part of the cost of affording three years of legal training, would afford a ground for constitutional complaint if the charge here were an admission policy discriminating against racial or religious groups. But while a grant or other index of state involvement may be impermissible when it 'fosters or encourages' discrimination on the basis of race, the same limited involvement may not rise to the level of 'state action' when the action in question is alleged to affront other constitutional rights.

Id. at 1142.

discrimination are deeply offensive, and the right to be free from such discrimination is of paramount constitutional importance. But there is no basis -- and the court below provided none -- for holding that First Amendment rights are entitled to any lower level of protection than these or any other constitutional rights.

The Second Circuit's use of different state action tests for different constitutional rights cannot be reconciled with this Court's precedents. In its state action jurisprudence this Court has long used race and nonrace precedents interchangeably. For example, in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, a case involving due process rights of electric company customers, this Court did not hesitate to rely on state action cases involving race discrimination claims. *See id.* at 357-58 (citing *Burton v. Wilmington Parking Authority*, 365 U.S. 715 and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163); *see also Rendell-Baker v. Kohn*, 457 U.S. at 842-43 (employing *Burton* analysis in First Amendment case); *Blum v. Yaretsky*, 457 U.S. at 1010-11 (applying *Burton* analysis in due process case).

The differential state action approach endorsed by the Second Circuit is also inconsistent with the view of most circuits. At least four circuits have expressly declined to adopt different state action standards for different constitutional rights. *See Downs v. Sawtelle*, 574 F.2d 1, 6 n.5 (1st Cir.), *cert. denied*, 439 U.S. 910 (1978); *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16, 19 (5th Cir.)(*en banc*), *cert. denied*, 429 U.S. 872 (1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975)(Stevens, J.), *cert. denied*, 425 U.S. 943 (1976); *Adams v. Southern California First Nat'l Bank*, 492 F.2d 324, 333 n.23 (9th Cir. 1973), *cert. denied*, 419 U.S. 1006 (1974).

At least five additional circuits have, like the Supreme Court, implicitly rejected the Second Circuit's use of different state action tests depending on the right asserted by using race discrimination precedents in nonrace cases. *See, e.g., Wolotsky v. Huhn*, 960 F.2d 1331 (6th Cir. 1992)(applying *Burton* analysis in case involving due process and equal protection claims of homosexual); *Jackson v. Pantazes*, 810 F.2d 426 (4th Cir. 1987)(employing *Burton* analysis in Fourth Amendment case); *Morast v. Lance*, 807 F.2d 926 (11th Cir. 1987)(applying *Burton* analysis in First and Fifth Amendment case); *Anderson v. USAir, Inc.*, 818 F.2d 49 (D.C.Cir. 1987)(employing *Burton* analysis in Fifth Amendment case); *Krynicky v. Univ. of Pittsburgh*, 742 F.2d 94 (3d Cir. 1984)(employing *Burton* analysis in case raising First Amendment, due process, and gender discrimination claims), *cert. denied*, 471 U.S. 1015 (1985).

The flaw in the Second Circuit's approach, however, is more serious than a simple departure from prevailing judicial practice. It represents an erroneous approach to the whole issue of state action. The question in state action cases is whether the government is sufficiently involved with the private entity to trigger the application of constitutional standards. There is no logical reason that the degree of state involvement should depend on the underlying constitutional claim.

In addition, the Second Circuit's approach is wrong because in imposing a higher state action threshold on First Amendment claims than on Equal Protection claims, the court has assumed a hierarchy of constitutional values for state action purposes that does not exist, even in the Second Circuit, for adjudicating substantive constitutional claims. To the contrary, it is clear as a matter of substantive constitutional law that First Amendment rights are "fundamental" and that their abridgement triggers strict scrutiny. The same standard applies to constitutional claims of racial discrimination. Once state action is found, therefore, free speech claims and race discrimination claims are analyzed in similar ways. Given that fact, there is no justification for the

differential state action standard adopted by the Second Circuit. Nor is it benign. Rather, its unequal treatment of First Amendment claims represents a serious distortion of our most basic constitutional norms. *See, e.g., Downs*, 574 F.2d at 6 n.5 (even if court were to adopt differential tests for state action it "would be inclined to group infringements of fundamental rights and racial discrimination together for the purpose of state action analysis just as they receive comparable scrutiny in equal protection cases").

To say that First Amendment rights are entitled to the highest level of solicitude at every stage of the judicial process -- including the stage at which state action is determined -- is not to detract from the importance of race or gender discrimination claims. But it is to say that First Amendment rights do not belong in some category of rights that are less important or less worthy of protection.[6]

It is also not to say that in appropriate circumstances a court cannot engage in a ranking of constitutional rights. This Court has done so regularly in creating the

[6] In contrast to the Second Circuit, this Court has consistently declined to place either race discrimination or free expression higher on some abstract constitutional scale. In *R.A.V. v. St. Paul*, 505 U.S. __, 112 S.Ct. 2538 (1992), for example, this Court struck down on First Amendment grounds a city ordinance banning the display of symbols, including burning crosses, that arouse anger in others on the basis of race, color, creed, religion or gender. In holding that the ordinance impermissibly infringed on the right of free expression, the Court stated: "Let there be no mistake about our belief that burning a cross in someone's front yard is reprehensible. But St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire." *Id.* at 2550.

"fundamental right" and "suspect class" categories under equal protection law. *See* Tribe, AMERICAN CONSTITUTIONAL LAW at §§16-1 -- 16-59. And even within particular rights, this Court has carved out levels of priority. *See, e.g., Virginia State Board of Pharmacy v. Virginia Consumer Council*, 425 U.S. 748 (1976)(commercial speech accorded a lower standard of protection than noncommercial speech).

However, the difficult balancing of substantive rights that is sometimes required in constitutional adjudication should be done straightforwardly, on the merits, rather than by importing false distinctions into the state action doctrine that enable a court to avoid any consideration of the constitutional rights at stake. If this Court reverses the decision below, the case can be remanded and the trial court will then have ample opportunity to consider the constitutional claims fully -- not based on an abstract checklist of priorities, but based on the facts of the case before it.

CONCLUSION

For the reasons stated above, the judgment below should be reversed.

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